

Public Prosecutor v Awang Raduan bin Awang Bol

HIGH COURT (SIBU) — CRIMINAL TRIAL NO 20-47-10 OF 1995
TEE AH SING J
15 DECEMBER 1997

Criminal Law — Murder — Defence of intoxication — Whether accused had proved on balance of probabilities that he was drunk to such an extent as not to know what he was doing — Penal Code (FMS Cap 45) s 302

Criminal Law — Murder — Defence of grave and sudden provocation — Test to be applied — Whether provocation would also have deprived a reasonable man of power of self-control — Whether act provoked had reasonable relationship to the provocative act — Burden on the accused to establish provocation on balance of probabilities — Penal Code (FMS Cap 45) s 302, Exception 1

The accused was charged with murder by causing the death of one Awang Jamli bin Awang Sani ('the deceased'), an offence punishable under s 302 of the Penal Code (FMS Cap 45). The deceased was in a coffee shop with his friends. The accused then joined them and drank a small bottle of stout. The accused subsequently asked money from the deceased but the deceased did not give him any money. The accused cursed the deceased in an angry manner and left the coffee shop. Later on, the deceased went to play chess with PW5, PW6 and PW7. PW5 and PW7 testified that the accused came to the place where they were seated and hacked the deceased with an axe and stabbed him with a knife. The accused in his testimony testified that on that day, he drank one bottle of liquor and one big bottle of Guinness Stout at a supermarket and later a small bottle of stout at the coffee shop where he joined the deceased and the others. According to the accused, the deceased asked for an axe to repair a bench. He then left the coffee shop and went home. He took an axe and a knife and went to the place where the deceased was playing chess. He intended to give the axe to the deceased to repair the bench. However, the deceased pushed the axe away and said that the accused looked like someone wanting to steal. On hearing this, the accused felt angry and he hit the deceased with the axe. The deceased then said that since he had beaten him, if he dared, then he should stab him. On hearing this, the accused was very angry and he stabbed the deceased with the knife. The accused testified that he attacked the deceased because he was angry with the deceased and he was drunk at that time and not quite aware of what he was doing. The accused raised the defence of drunkenness and the defence of grave and sudden provocation.

Held, finding the accused guilty of the offence charged:

- (1) Having examined and considered the evidence adduced by the prosecution, the court was satisfied that the prosecution had established beyond reasonable doubt that it was the accused who inflicted the injuries on the deceased which caused his death. Having examined the injuries sustained by the deceased and the

- A weapon used as well as the evidence adduced as a whole, the court was satisfied that at the close of the case for the prosecution, the prosecution had established beyond reasonable doubt that there was intention to cause bodily injuries which were sufficient in the ordinary course of nature to cause death (see pp 470I and 471C).
- B (2) The defence had not adduced any evidence that by reason of intoxication the accused was insane, temporarily or otherwise. Therefore, the provisions of s 85(ii) of the Penal Code did not apply (see p 476B).
- C (3) In his cautioned statement, the accused did not mention that he had consumed a bottle of alcoholic drink and one big bottle of stout at the supermarket. Nowhere in his cautioned statement did the accused mention that he was drunk. Therefore, the court rejected his evidence in court that he had consumed a bottle of alcoholic drink and a big bottle of stout and that he was drunk as mere afterthoughts. Even if the accused did consume one bottle of alcoholic drink and one big bottle of Guinness Stout at the supermarket as alleged by him and the fact that the accused did consume a small bottle of Guinness Stout at the coffee shop, the accused did not call any expert evidence to establish the probable blood alcohol in him at the time of the offence and how that level of intoxication would have affected the accused. In the absence of expert evidence, the more reliable indicator of the state of the mind of the accused must be the conduct of the accused immediately prior to and after the offence.
- D The evidence showed that the accused knew what he was doing. If he was drunk, surely he could not remember the words uttered by the deceased and the stabbings in vivid detail. At the time of the incident, the accused could distinguish the deceased, PW5 and PW7 at the place of incident. Further, the court accepted the evidence that the accused did not appear drunk. All the aforesaid showed that the accused was not drunk to such an extent as not to know what he was doing. He was conscious of his surroundings and knew what he was doing. In the circumstances, the accused could not rely on the defence of intoxication as provided by s 86(ii) of the Penal Code as he failed to prove it on a balance of probabilities. There could be no doubt whatsoever that the injuries were caused by the accused and that he intentionally caused the death of the deceased (see pp 476I, 477A–H and 478F–I).
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- I (4) To succeed in a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the court that not only by the acts of the deceased that the accused had been deprived of the power of self-control, but such acts of provocation would also have deprived a reasonable man of the power of self-control. If the act of retaliation is entirely out of proportion to the provocation offered, the plea of grave and sudden provocation fails. The matter must be considered objectively and the burden

is on the accused to establish provocation on a balance of probabilities (see p 479D-G); *Ikau anak Mail v PP* [1973] 2 MLJ 153 and *Vijayan v PP* [1975] 2 MLJ 8 followed.

In this case, the accused was angry with the deceased when the deceased did not give him any money at the coffee shop and he was also angry with the deceased on hearing what the deceased said to him at the place of incident. Due to his anger, the accused lost his self-control. However, by the standard of a reasonable man, what the deceased said to the accused could not amount to grave and sudden provocation of the accused.

Further, the accused must have known that the repeated stab wounds which he inflicted on the deceased were of a kind which would likely result in death. The means of retaliation used by the accused was an unreasonable one in the circumstances bearing in mind what the deceased said to him and that the deceased was unarmed. In the result, the defence of provocation failed (see p 480C-G).

[Bahasa Malaysia summary]

Tertuduh dipertuduhkan dengan kesalahan membunuh dengan menyebabkan kematian seorang bernama Awang Jamli bin Awang Sani ('si mati'), suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksan (NMB Bab 45). Si mati berada di sebuah kedai kopi dengan rakan-rakannya. Tertuduh kemudiannya menyertai mereka dan meminum sebotol kecil stout. Tertuduh kemudiannya meminta duit daripada si mati tetapi si mati tidak memberikan apa-apa wang. Tertuduh memaki si mati dengan marahnya dan beredar dari kedai kopi. Kemudiannya, si mati telah pergi bermain catur dengan PW5, PW6 dan PW7. PW5 dan PW7 memberi keterangan bahawa tertuduh telah datang ke tempat di mana mereka duduk dan menetak si mati dengan kapak dan menikamnya dengan sebilah pisau. Tertuduh dalam testimoninya memberi keterangan bahawa pada hari itu, dia telah meminum sebotol arak dan sebotol besar Guinness Stout di sebuah pasaraya dan kemudiannya sebotol kecil stout di kedai kopi di mana dia menyertai si mati dan yang lain. Menurut tertuduh, si mati telah meminta kapak untuk membaiki bangku. Dia kemudiannya beredar dari kedai kopi dan balik ke rumah. Dia telah mengambil kapak dan sebilah pisau dan pergi ke tempat di mana si mati bermain catur. Dia berniat memberikan kapak kepada si mati untuk membaiki bangku. Namun demikian, si mati telah menolak kapak itu dan mengatakan bahawa tertuduh kelihatan seperti orang yang hendak mencuri. Selepas mendengar ini, tertuduh naik marah dan memukul si mati dengan kapak. Si mati kemudiannya mengatakan bahawa oleh kerana dia telah memukulnya, jika dia berani maka dia harus menikamnya. Apabila mendengar ini, tertuduh amat marah dan dia telah menikam si mati dengan pisau. Tertuduh memberi keterangan bahawa dia menyerang si mati kerana dia marah dengan si mati dan dia mabuk pada masa itu dan tidak berapa sedar akan apa

A yang dibuatnya. Tertuduh membentangkan pembelaan sifat pemabuk dan pembelaan bangkitan marah besar dan mengejut.

Diputuskan, mendapati tertuduh bersalah atas kesalahan yang dipertuduhkan:

B (1) Selepas memeriksa dan mempertimbangkan keterangan yang dikemukakan oleh pihak pendakwa, mahkamah berpuas hati bahawa pihak pendakwa telah membuktikan melampaui keraguan munasabah bahawa tertuduh telah menyebabkan kecederaan kepada si mati yang mengakibatkan kematiannya.

C Selepas memeriksa kecederaan yang dialami oleh si mati dan senjata yang digunakan serta keterangan yang dikemukakan secara keseluruhan, mahkamah berpuas hati bahawa di penutup kes pendakwa, pihak pendakwa telah membuktikan melampaui keraguan munasabah bahawa terdapat niat untuk mencedera yang mencukupi dalam keadaan biasa untuk mengakibatkan kematian (lihat ms 470I dan 471C).

D (2) Pihak pembelaan tidak mengemukakan sebarang keterangan bahawa disebabkan mabuk tertuduh hilang akal, sama ada buat sementara waktu atau sebaliknya. Maka, peruntukan s 85(ii) Kanun Keseksaan tidak terpakai (lihat ms 476B).

E (3) Dalam pernyataan beramarannya, tertuduh tidak menyebut bahawa dia telah minum sebotol minuman alkohol dan sebotol besar stout di pasaraya. Tidak di mana-mana pun disebut dalam pernyataan beramaran bahawa tertuduh mabuk. Maka, mahkamah menolak keterangan di mahkamah bahawa dia telah meminum sebotol alkohol dan sebotol besar stout dan bahawa dia mabuk sebagai suatu tambahan. Sekalipun tertuduh minum sebotol alkohol dan sebotol besar Guinness Stout di pasaraya seperti yang dikatakannya dan hakikat bahawa tertuduh minum sebotol kecil Guinness Stout di kedai kopi, tertuduh tidak memanggil apa-apa keterangan pakar untuk membuktikan alkohol darah yang mungkin dalam tertuduh pada masa kesalahan dan bagaimana aras mabuk telah menjejaskan tertuduh. Dalam ketiadaan keterangan pakar, penunjuk keadaan minda tertuduh yang lebih dipercayai mestilah kelakuan tertuduh sebelum dan selepas kesalahan.

H Keterangan menunjukkan bahawa tertuduh tahu apa yang dibuatnya. Sekiranya dia mabuk, pastinya dia tidak ingat kata-kata yang dilafazkan oleh si mati dan kejadian menikam dengan begitu terperinci. Pada masa kejadian, tertuduh boleh membezakan si mati, PW5 dan PW7 di tempat kejadian. Selanjutnya, mahkamah menerima keterangan bahawa tertuduh tidak kelihatan mabuk. Segala yang dikatakan menunjukkan bahawa tertuduh tidak begitu mabuk hinggalah tidak tahu apa yang dibuatnya. Dia sedar akan keadaan sekeliling dan tahu apa yang dilakukannya. Dalam keadaan ini, tertuduh tidak boleh

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mengharapkan pembelaan mabuk seperti yang diperuntukkan oleh s 86(ii) Kanun Keseksaan kerana dia gagal membuktikannya atas imbalan kebarangkalian. Tiada apa-apa keraguan bahawa kecederaan disebabkan oleh tertuduh dan bahawa dia dengan sengaja menyebabkan kematian si mati (lihat ms 476I, 477A-H dan 478F-I).

- (4) Untuk berjaya dalam pembelaan bangkitan marah besar dan mengejut, adalah perlu di sisi undang-undang untuk pihak pembelaan memuaskan mahkamah bahawa tertuduh bukan sahaja kehilangan kuasa mengawal diri melalui perbuatan si mati, tetapi perbuatan bangkitan marah demikian juga akan merampas kuasa kawalan sendiri daripada orang munasabah. Sekiranya perbuatan tindakan balas keseluruhannya tidak seimbang dengan bangkitan marah yang timbul, rayuan bangkitan marah besar dan mengejut akan gagal. Perkara ini mestilah dipertimbangkan secara objektif dan beban terletak pada tertuduh untuk membuktikan bangkitan marah pada imbalan kebarangkalian (lihat ms 479D-G); *Ikau anak Mail v PP* [1973] 2 MLJ 153 dan *Vijayan v PP* [1975] 2 MLJ 8 diikuti.

Dalam kes ini, tertuduh marah dengan si mati apabila si mati tidak memberikannya duit di kedai kopi dan dia juga marah dengan si mati apabila mendengar apa yang dikatakan oleh si mati kepadanya di tempat kejadian. Akibat kemarahannya, tertuduh kehilangan kawalan sendiri. Walau bagaimanapun, melalui darjah orang munasabah, apa yang dikatakan oleh si mati kepada tertuduh tidak sama seperti bangkitan marah besar dan mengejut terhadap tertuduh.

Seterusnya, tertuduh mestilah mengetahui bahawa kecederaan tikam yang berulang yang diakibatkan kepada si mati adalah jenis kecederaan yang boleh menyebabkan kematian. Cara tindakan balas yang digunakan oleh tertuduh adalah tidak munasabah dalam keadaan ini dengan mengingati apa yang dikatakan oleh si mati kepada tertuduh dan bahawa si mati tidak bersenjata. Akibatnya, pembelaan bangkitan marah gagal (lihat ms 480C-G).]

Notes

For cases on murder, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 887-963.

Cases referred to

Ikau anak Mail v PP [1973] 2 MLJ 153 (folld)

Vijayan v PP [1975] 2 MLJ 8 (folld)

Legislation referred to

Evidence Act 1950 s 105

Penal Code (FMS Cap 45) ss 85(ii)(b), 86(ii), 300, 302

- A *Awang Armadajaya bin Awang Mahmud* (Deputy Public Prosecutor) for the prosecution.
Hii Hieng Sing (assigned counsel) for the accused.

Cur Adv Vult

- B **Tee Ah Sing J:** Awang Raduan bin Awang Bol ('the accused') is charged as follows:

That you, on 25 November 1994 at about 9.50pm at Kampung Tutus Hilir, Mukah, in the District of Mukah, in the State of Sarawak, committed murder by causing the death of one Awang Jamli bin Awang Sani (m) and that you have thereby committed an offence punishable under s 302 of the Penal Code (FMS Cap 45).

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In this case, the burden is on the prosecution to prove beyond reasonable doubt the following essential elements, namely:

- D (1) that Awang Jamli bin Awang Sani had died on 25 November 1994 at about 9.50pm at the junction of Kampung Tutus Hilir and Kampung Bedanga, Mukah;
- (2) that his death had been caused by the accused; and
- (3) that the said act or acts of the accused was or were done —
- E (a) with the intention of causing death; or
- (b) with the intention of causing such bodily injury as the accused knew to be likely to cause death of the person to whom the harm was caused; or
- F (c) with the intention of causing bodily injury to the deceased and the bodily injury to be inflicted was sufficient in the ordinary course of nature to cause death; or
- (d) with the knowledge that the act or acts was or were so imminently dangerous that it or they must in all probability cause death or such bodily injury as is likely to cause death and the act or acts was or were done without any excuse for incurring the risk of
- G causing death or such bodily injury as is likely to cause death.

The prosecution's case

- H It is the case for the prosecution that on 25 November 1994 Sabri bin Jol (PW20) ('Sabri') and Awang Jamli bin Awang Sani ('the deceased') were in Yong Kang coffee shop drinking 'cap rusa' which is an alcoholic drink. Then Rozlan bin Salleh (PW6) ('Rozlan') and Ariffin bin Spawi (PW19) ('Ariffin') joined them. Later, the accused came to the shop. The accused drank stout. According to Ariffin, at Yong Kang coffee shop he met Sabri, the deceased and the accused. Ariffin, Rozlan and Sabri drank alcoholic drinks at the shop. Ariffin and Sabri testified that the accused then asked money from the deceased. The deceased told the accused that he had only RM1.50. When the deceased did not give any money, the accused said 'kedekut' in an angry manner. The accused then asked money from Yii
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Yong Kang (PW18) ('Yong Kang'). The accused then left the coffee shop while they continued with the drinks till finished. A

Ariffin and the deceased then went to the junction of Jalan Kampung Tutus Hilir and Jalan Kampung Bedanga while Sabri went home.

In cross-examination, Ariffin stated that he and his friends drank brandy. They consumed one small bottle. The deceased also drank. He saw the accused drink Guinness Stout. The accused did not appear to have drunk a lot. The accused asked 50 sen from the deceased as the accused wanted to drink coffee. B

Yong Kang testified that on 25 November 1994 he worked in his sister's coffee shop named Tiong Hin Café. At about 7.50pm, he saw five regular customers come to the shop. They were Rozlan, Sabri, Nora, Ariffin and the deceased. They were sharing one small bottle of 'cap apek' which is a locally-made alcoholic drink. C

Sometime after 8pm, the accused appeared and joined them. The accused brought with him a small bottle of Guinness Stout. The accused was asking him whether he (Yong Kang) had 50 sen. He gave the accused 50 sen and the group of them said he would be paid later on. D

After he gave the accused 50 sen, he heard the accused curse the group of people 'kedekut' and 'celaka' very loudly.

Both Yong Kang and Ariffin identified exh P7B as the photograph of the deceased. E

In cross-examination, Yong Kang stated that the accused did consume the small bottle of Guinness Stout in the coffee shop. The accused did not appear drunk. The accused appeared normal. He agreed that it was possible that the accused did buy one bottle of Guinness Stout from his shop but he could not remember. When the accused cursed the group of friends, the accused did not mention any names. The group of friends did not respond to the accused's cursing words. F

Rozlan has testified that on 25 November 1994 at about 9pm, he was playing chess with the deceased on the road at the junction of Jalan Kampung Tutus Hilir and Kampung Bedanga. Later, he saw Awang Roslan bin Awang Seruji (PW5) ('Awang Roslan') come and sit on the bench. After this, the accused came for a short while. Then the accused left. At that time, he saw the axe was tucked at the side of the accused's trousers but only the handle could be seen. After the accused left, Rozlan told the deceased that he wanted to go home as he was hungry. So he went home. Awang Roslan was then with the deceased. Before he went home, he saw the accused was in the area. G H

Awang Roslan has testified that on 25 November 1994 at about 9pm on his way home from the town, he stopped at the junction of Kampung Bedanga. He went to see the deceased and Rozlan playing chess on the ground while he sat on the bench. The area was bright as it was under a street lighting. I

While the deceased and Rozlan were playing, he saw the accused come for a short while. The accused just looked at them playing and then went off.

- A After both of them had finished their game, Rozlan said he was hungry so Rozlan went home. Awang Roslan further testified that the accused came back. The accused hacked the deceased with the axe. He identified the axe as exh P4A. While this happened, the deceased defended himself. The axe was thrown off. And after that the accused stabbed the deceased with a knife. He identified the knife as exh P6A. Awang Roslan just told the accused to stop but the accused ignored him. He did not know what happened to the deceased when the accused stabbed the deceased because after he asked the accused to stop, he went to the Ketua Kampung's house asking for help. He told the Ketua Kampung, Hj Hamdan bin Sulek (PW4) ('Hj Hamdan') that the deceased and the accused were quarrelling and asked for his help.

- D Kasma bte Salleh (PW7) ('Kasma') testified that on 25 November 1994, she was staying at No 3, Jalan Tutus Hilir, Mukah. At about 9pm she was at a public telephone telephoning her friend. Near the junction she saw Awang Roslan and the deceased were sitting. She also saw the accused at the area sitting. After she made the telephone call, she went to the junction and sat together with the deceased and Awang Roslan. At that time, she saw the accused get up and go to the place where they were seated and throw the axe (which she identified as exh P4A) towards the deceased. After that she ran towards her house. While running she heard the deceased said 'aduh, aduh'. It sounded as if he was in pain.

- E In cross-examination, Awang Roslan said he did not know which part of the deceased's body was stabbed because both of them were struggling with each other. He saw the accused stab the deceased many times. Before the accused stabbed the deceased, he did not hear both of them speaking to each other. He saw bloodstains on the blade and handle of the axe.

In cross-examination, Kasma stated that the axe hit the head of the deceased. After that, she saw the accused stab the deceased with a knife. The accused stabbed three times at the deceased's back

- G Hj Hamdan testified that on 25 November 1994, he was at Kampung Tutus Hilir. At about 9.50pm, Awang Roslan came to his house. Awang Roslan told him that the deceased was slashed by the accused. Rozlan has testified that on reaching home, he heard Awang Roslan asking for help from the Ketua Kampung, Hj Hamdan because there was some problem. When he heard this, he went to the place where he saw the deceased lying down and an axe nearby.

- H Hj Hamdan and Awang Roslan went to the scene. Hj Hamdan saw the deceased was lying on his back motionless. According to Awang Roslan, he saw the deceased was lying down near the bench unconscious. He identified the deceased in photographs exhs P7B, C and D.

- I After finding the body of the deceased motionless, Hj Hamdan then went to Salleh Hj Jais's house and made a telephone call to the Mukah Police Station.

According to Lance Cpl 6169 Adam ak Allap (PW3) ('L/Cpl Adam') on 25 November 1994, at about 9.55pm, he received this telephone call. Hj Hamdan informed L/Cpl Adam that there was a quarrel at his kampung.

L/Cpl Adam then handed the telephone to Sgt Peter Hii Seng Mee (PW1) ('Sgt Peter Hii'). Sgt Peter Hii testified that he was informed by L/Cpl Adam about a quarrel in the village. He then lodged a Police Report No 754-94 (exh P3). After lodging the report, Sgt Peter Hii informed the officer-in-charge of the police station, DSP Jonathan Barau Balong (PW21) ('DSP Jonathan Barau').

After making the telephone call to the police, Hj Hamdan, Pannnyau bin Mangis (PW10) ('Pannnyau'), Moksini bin Rani and Rozlan went to the scene to guard the body of the deceased. At the scene, Hj Hamdan saw an axe which he identified as exh P4A. He also stated that P7A-K are photographs of the scene while P7A and P7B are photographs of the deceased.

Pannnyau has testified that he saw the body of the deceased lying near a bench. Photographs 7B-F are photographs of the deceased.

Lance Cpl 108611 Isahak bin Tambi (PW12) ('L/Cpl Isahak'), Lance Cpl Ma Boon Lim, KT Dominic Narok, KT Tan Kheng Tieh (PW17) ('KT Tan') and L/Cpl Adam went to the scene. On arrival at the scene, L/Cpl Isahak saw one dead body lying on the ground and not breathing. L/Cpl Adam testified he saw a youth lying on his back motionless. He identified exhs P7A-K as the photographs taken at the scene. At the scene he found an axe not far from the victim's body. He identified exh P4A as the axe.

On being informed by Sgt Peter Hii of the incident, DSP Jonathan Barau went to the scene at Kampung Titus Hilir, Mukah together with Sgt Jeffery Unjie (PW11) ('Sgt Jeffery Unjie'). DSP Jonathan Barau saw a dead body and was informed that it was Awang Jamli ('the deceased'). The deceased was lying dead with his face facing upwards. On closer inspection, he noticed that there was a deep cut on his upper right chest. He instructed Sgt Jeffery Unjie to take photographs (exhs P7A-K). He found an axe next to the head of the deceased. He identified exh P4A as the axe. The blade of the axe was slightly submerged to the ground. On closer examination, he could see very faint reddish substance which was believed to be blood found at the blade of the axe. The area was very bright because there was street lighting directly above the wooden bench. He drew a sketch plan. This was tendered as exh P10 with the neat sketch plan admitted as exh P11 and the key as P11K. At the scene, he recovered the axe (exh P4A).

The body of the deceased was taken by DSP Jonathan Barau to the Mukah Hospital for a post-mortem which was conducted on 26 November 1994 by Dr Sanjiv a/l Samanathan (PW8) ('the doctor') in the presence of DSP Jonathan Barau Balong and Sgt Jeffery Unjie and the body was identified by Awang Hapni bin Awang Sani (PW9) ('Awang Hapni') as that of his brother, Awang Jamli bin Awang Sani, the deceased, to the doctor.

DSP Jonathan Barau instructed Sgt Jeffery Unjie to take photographs at the mortuary (exhs P8A-H).

After the post-mortem, Awang Hapni took the body of the deceased for burial. In cross-examination, Awang Hapni has stated that he knew the accused since childhood. The accused was a good friend of the deceased.

A The doctor testified that the deceased suffered five injuries. The first injury was on the forehead measuring $4\frac{1}{2}$ by $1\frac{1}{2}$ cm. It was superficial. Over the chest, there were two wounds. On the left side of the chest there was an oval-shaped injury measuring 3 by $1\frac{1}{2}$ cm. On the right side there was an irregularly-shaped wound measuring $6\frac{1}{2}$ by 2cm. Over the back, the deceased had two injuries. He had a linear incised wound 5cm by $\frac{1}{2}$ cm above the left scapular. The last injury was an oval incised wound 4cm by $1\frac{1}{2}$ cm at the left inter-scapular region which caused hypovolemic shock (ie massive bleeding).

B The doctor testified that the cause of death was hypovolemic shock due to penetrating injury to the heart. In his opinion, the instrument which caused the incised wound at the left inter-scapular region is a knife of at least 6cm long.

C Cpl 48932 Silverius Samuel (PW14) ('Cpl Silverius') testified that on 26 November 1994 at about 3.30pm, he led a police party comprising himself, Lance Cpl Rosli bin Mat (PW16) ('L/Cpl Rosli'), Lance Cpl Tambahan Perang Singeh (PW15) ('L/Cpl Tambahan Perang Singeh') and KT Tan to search for the accused among the bushes. According to L/Cpl Rosli he saw the accused lying down covered with mud. When the accused got up, he saw the accused lifting up his knife. He hit the accused's hand and the knife fell down. He called the other police personnel for help. KT Tan, L/Cpl Tambahan Perang Singeh and Cpl Samuel came to help. L/Cpl Tambahan Perang Singeh then handcuffed the accused. L/Cpl Rosli then took the knife which he identified as exh P6A. The accused was brought to the Mukah Police Station. L/Cpl Rosli then lodged a report (exh P9). He then handed the accused and the knife to the inquiry room officer on duty.

F On 28 November 1994 at 8.45am, DSP Jonathan Barau instructed Sgt Jeffery Unjie and L/Cpl Isahak to pack the axe, the white T-shirt and the commando knife.

G L/Cpl Isahak then packed the exhibits, namely, an axe (P4A), one T-shirt covered with bloodstains (P5C) and the commando knife (P6A). After he finished packing the exhibits, he labelled the packets.

H On 29 November 1994, L/Cpl Isahak handed over to Law Cheng Siew @ Low Cheng Siew (PW2) ('the chemist') three exhibits marked E1, E2 and E3 respectively. In package E1 was an axe (P4A). In package E2 was a T-shirt (P5C) and in package E3 was a knife (P6A) in a sheath. On analysis, the chemist did not find any bloodstains on the axe and the knife. On the T-shirt, he found it to bear human Group O bloodstains.

I The chemist also stated that the piece of brown paper appears to have been attacked by termites. He also stated that the red seal on the termite-eaten paper in the package marked E2 is that of the Jabatan Kimia Kuching seal.

In cross-examination, the chemist stated that the three exhibits were not in the same condition as when they were handed over to him by L/Cpl Isahak. The difference is the original packing has been attacked by termites as in E1 and E2.

After analysis, the chemist sealed all the exhibits with the Jabatan Kimia Kuching seal and returned them to L/Cpl Isahak on 21 January 1995. L/Cpl Isahak handed over the three packets of exhibits to Sgt Mejar Julaihi (PW13) ('Sgt Mejar Julaihi') at the Mukah Police Station. Sgt Mejar Julaihi kept the exhibits in the exhibit store. In August 1996, Sgt Mejar Julaihi made a check at the exhibit store. He found that the wrappers to the three exhibits were eaten by termites. What was left were the exhibits like the axe (P4A), knife (P6A), T-shirt (P5C) and the seal. He then instructed L/Cpl Isahak to repack the exhibits properly. And the exhibits were handed over to L/Cpl Isahak for production in court. A B

On 1 December 1994 at 8.55am, DSP Jonathan Barau revisited the scene with Sgt Jeffery Unjie. He instructed Sgt Jeffery Unjie to take one photograph (exh P18). On the middle top part of the photograph shows the street lighting, a point marked E in his sketch plan. C

Death of the deceased

Awang Roslan has testified that the body found lying down near the junction of Kampung Tutus Hilir, Mukah was that of the deceased. Hj Hamdan has also stated that the dead body found at the scene was that of the deceased. Panniau has testified the dead body as that of the deceased. Before the post-mortem was conducted on 26 November 1994, Awang Hapni identified the body to the doctor as that of his brother Awang Jamli bin Awang Sani (the deceased). I am of the view on the evidence adduced that the prosecution has proved beyond reasonable doubt that the deceased was Awang Jamli bin Awang Sani who had died on 25 November 1994 at about 9.50pm at Kampung Tutus Hilir, Mukah. D E

Death caused by the act of the accused

I accept the evidence of Awang Roslan that on 25 November 1994 he saw the accused hack the deceased with the axe (P4A). While this happened, the deceased defended himself. The axe was thrown off. After that he saw the accused stab the deceased with a knife (P6A). In cross-examination, Awang Roslan said that he did not know which part of the deceased's body was stabbed because both of them were struggling with each other. He saw the accused stab the deceased many times. F G

I accept the evidence of Kasma that when the accused threw the axe (P4A) towards the deceased, it hit the head of the deceased. Kasma has also testified in cross-examination that she saw the accused stab the deceased with a knife. The accused stabbed three times at the deceased's back. The direct evidence of Awang Roslan and Kasma clearly shows that it was the accused who inflicted injuries to the deceased. H

Having examined and considered the evidence adduced by the prosecution, I was satisfied that the prosecution had established beyond reasonable doubt that it was the accused who inflicted the injuries on the deceased which caused his death as clearly stated by the doctor. I

A *Act or acts done with the intention of causing death*

The next issue which I considered before calling for the accused to enter upon his defence was whether there was any intention or knowledge to inflict the injuries which caused the death of the deceased.

- B The ingredient is whether such act of the accused which caused the death of the deceased was done with the intention of causing death or that it was done with the intention of causing bodily injury as the accused knew to be likely to cause death or was sufficient in the ordinary course of nature to cause death. Having examined the injuries sustained by the deceased and the weapon used (ie a knife, exh P6A) as well as the evidence adduced
- C as a whole, I was satisfied that at the close of the case for the prosecution, the prosecution had established beyond reasonable doubt that there was intention to cause bodily injuries which were sufficient in the ordinary course of nature to cause death.

- D At the close of the prosecution's case, counsel for the accused did not make any submission. However, the learned deputy public prosecutor made a written submission.

At the close of the case for the prosecution, after a maximum evaluation of the prosecution's case, I was satisfied beyond reasonable doubt that the prosecution had made the case against the accused which, if unrebutted, would warrant his conviction.

- E I accordingly called upon the accused to make his defence. The three alternatives were explained to him and he elected to give evidence on oath.

The accused testified in examination-in-chief that he completed Form One education.

- F On 25 November 1994 at 5pm, he went to Sing Yong Supermarket at Mukah. At Sing Yong Supermarket, he bought one bottle of 'koping chiew' which is a liquor for RM7.80 and one big bottle of Guinness Stout for RM10.80. He drank the bottle of koping chiew and the big bottle of Guinness Stout. After that, he went by motor cycle to his house at No 1, Kampung Tutus Hilir, Mukah. He took some money from his family shop.

- G His elder sister, Dayang Saedah was running the shop.

After taking the money, he went to town again as he wanted to drink. He went to Yong Kang coffee shop at 7pm. At the coffee shop, he met the deceased, Rozlan, Kasma, Sabri and Ariffin. They were his friends. His friends drank 'cap apek' which is a liquor drink and some soft drinks.

- H The accused bought one small bottle of stout. He drank the stout.

- I He joined the group of friends at the same table. They talked about many things and the accused told them about the new knife that he had bought. According to the accused, the deceased asked for permission to look at the knife. The deceased also asked for an axe for his use to repair the bench. The deceased said this jokingly. And the accused told him it was OK. The accused was surprised why they wanted to see the knife and the axe that night and he was also feeling a little bit drunk. He was in the

shop from 7pm till nearly 8pm. Then he left the coffee shop and went to New Lane Restaurant to eat satay and drink a cup of tea. After that, he went home on his motor cycle. On the way, he stopped at the junction of Jalan Tutus Hilir to see Awang Roslan, Ariffin, Awang Ismail, Awang Adeni, Kasma, the deceased and Rozlan playing chess. Only Awang Roslan, Ariffin and Kasma were playing a local chess known as dam. After about two to three minutes he went home. He parked his motor cycle and he took an axe and a knife. He went back to the place and sat about 20ft away from them. He sat there feeling a bit drunk. While the rest had left leaving the deceased and Awang Roslan, the deceased waved for him, meaning called for him. So the accused went to the deceased with the knife and the axe in his hands. And the accused thrust the handle of the axe towards the deceased intending to give it to the deceased. And the deceased pushed it away and said, 'No need'.

The deceased said to him like someone wanting to steal. The deceased said, 'Ji aba menikau ji kau' in the Melanau language to him. The accused stated that the meaning is 'macam orang hendak mencuri'— like someone wanting to steal. On hearing this, the accused felt angry. So he hit on the deceased's head with the axe. Then they were struggling with each other. In the midst of struggling, the deceased said, 'Alang-alang hamun, kalau berani cucuk terus' in Malay. The accused stated the meaning is that since he had beaten him, if he dared then he should stab.

On hearing this, the accused was very angry and he stabbed the deceased's chest and back. The deceased also punched him on the chest but not strongly. After receiving the punch, he was angry. After that the accused asked Awang Roslan to ring up the police but the accused did not know whether Awang Roslan did so or not.

After he stabbed the deceased, the deceased fell down on the bench and the accused ran home. He brought along the knife while the axe was left behind. At home, he changed his shirt and he ran to the bushes in the early morning on 26 November 1994. In the evening of 26 November 1994, he was arrested by the police and detained at the Mukah Police Station.

On 29 November 1994, he gave a cautioned statement to DSP Nicholas Sebastian (DW2) ('DSP Nicholas Sebastian'). The languages used were Malay and some Melanau. The interpreter was Lance Cpl Edmund Emus bin Siban (DW3) ('L/Cpl Edmund Emus'). The accused admitted that he gave the cautioned statement (exh D22) voluntarily and there was no threat, inducement or promise given for him to give the cautioned statement.

In cross-examination, the accused stated that he stabbed the deceased's chest and back with his knife. He admitted that the knife used was exh P6A.

When he went home from Sing Yong Supermarket, he was riding his motor cycle in a normal manner. He could see his way back properly.

After he went home, he went out again to Yong Kang coffee shop on a motor cycle. He was then normal. The friends at Yong Kang coffee shop were his friends since childhood. He asked for money from his friends in order to add up to his money for buying stout. He asked the money from

A Ariffin. He agreed that he asked the money from the deceased as he could not quite remember. He agreed that when the deceased refused to give him any money, he was very angry and he called the deceased 'kedekut' in a raised voice.

B He told his friends that he had a new knife and they said they wanted to see. He was the one who asked the deceased whether he wanted to see the knife.

He agreed that the request for the axe and the knife was just a joke. He agreed that he did not need to bring the axe and the knife at all.

C He disagreed that he asked money from Yong Kang when he could not get any money from his friends.

When he left Yong Kang coffee shop, he was normal but felt giddy.

D When he went to New Lane Restaurant, he was a little bit drunk. He agreed that he could understand what was going on around him at that time. He agreed that after he ate satay and drank tea at New Lane Restaurant, he was sober. After eating satay, he went home by motor cycle. He was normal but his head was giddy.

He agreed that when he stopped at the junction of Jalan Tutus Hilir and saw the deceased, he was still very angry with the deceased.

E He stated that maybe Awang Ismail and Awang Adeni were not at the junction.

He agreed that at that material time he wanted to punish the deceased.

When he went home from the junction, he was feeling very angry.

F He agreed that he did not normally carry an axe and a knife around. He agreed that he went home to get an axe and a knife. He had to search for the axe in the house which took quite a long time.

He agreed that when he arrived home he threw his clothes in the sitting room and in the bathroom because he was angry. He agreed that his anger was against the deceased. He agreed that he wanted to use the axe and the knife to punish the deceased.

G When he was asked, 'I put it to you that you knew what you wanted to do when you took the axe and the knife from your house that night', he answered, 'Not very normal as I was very angry'.

At the time when he was very angry, he wanted to repair the bench.

H He agreed that he waited about 20ft away from the deceased because he waited for people to go away from the deceased.

He agreed that the deceased did not say anything to him at all until he died.

I He agreed that he attacked the deceased with the axe first. He agreed that he used the knife because the deceased managed to hit the handle of the axe and it fell from his hand.

He agreed that there was no conversation at all between him and the deceased at the material time but the deceased did say that 'You look like a person who wanted to steal'. He agreed that the deceased was unarmed.

He agreed that he knew it was wrong to attack the deceased. It was his mistake.

When it was put to him that when he stabbed the deceased with the knife he intended to hurt him, he answered that it was not on purpose, he was drunk. A

He agreed that he knew the deceased could not fight him as the deceased was unarmed and smaller.

When it was put to him that he did not stop when Awang Roslan asked him to do so, he answered he did not hear as he was wearing a helmet. B

He wanted to go to town but on seeing the deceased, he stopped because he was angry with the deceased and at that time he was not aware of what he was doing. C

He admitted that he attacked the deceased with the knife three times.

He agreed that he could have just cursed the deceased instead of attacking him but he was drunk.

He agreed that he could walk properly that night.

He agreed that he attacked the deceased to revenge his anger earlier on at Yong Kang coffee shop. However, he added that at that time he was drunk. He agreed that he had a grudge against the deceased. The old grudge was because the deceased always promised to invite him for a drink but the deceased never did so. The deceased always had no money. He agreed that he was not angry with Awang Roslan and Kasma. D E

He agreed that he ran home after the incident because he knew he had done something wrong. He did not fall down while running home. When he ran home, he did not know that the deceased had died.

He agreed that the street light nearby was very bright.

The distance of Kampung Tutus Hilir to Yong Kang coffee shop or New Lane Restaurant is about 2km. F

If he was not mistaken, he was in New Lane Restaurant for about half an hour.

In re-examination, the accused stated he could not quite remember whether he asked money or not from the deceased because he was drunk at that time. G

He was asked, 'You told the court yesterday upon cross-examination that you wanted to punish Awang Jamli because he refused to give you money. By 'punish', did you mean 'to kill him'?' He answered, 'No'. He did not intend to punish the deceased but he admitted that he stabbed the deceased as he was drunk. H

He agreed that he told the court in answer to cross-examination that the deceased requested for an axe and knife from him and that it was just a joke.

At that time, the accused meant that the deceased was really asking for the axe and the knife. The accused did not realize that it was a joke. It was correct to say that he misapprehended the deceased. He misapprehended the deceased because at that time he was drunk. I

A When he left Yong Kang coffee shop, he was normal but felt giddy. By 'giddy' he meant just like a person who is a little bit drunk.

He was asked, 'You told the court yesterday that you wanted to use the knife and axe to punish Awang Jamli. Do you mean to kill Awang Jamli?' He answered, 'No. At that time I was drunk'.

B He used the axe and knife to attack the deceased because he was angry with the deceased and he was drunk at that time and not quite aware of what he was doing. He explained that at the material time, the deceased did speak to him, 'If you are daring, you stab me'. He also stated earlier on the deceased did say, 'Ji aba menikau' before the deceased said 'If you are daring, you stab me'.

C The accused also stated that when he thrust the handle of the axe to the deceased, the deceased then said, 'Ji aba menikau' and the accused stabbed the deceased.

D DSP Nicholas Sebastian testified that on 29 November 1994 at 11am, he was at the Ibu Pejabat Polis Daerah, Mukah to record the cautioned statement of the accused. He signed the cautioned statement (exh D22) at pp 2 and 11. The accused signed at the bottom of all the pages in the cautioned statement. The interpreter was L/Cpl Edmund Emus.

E Lance Cpl Edmund Emus has testified that he was the interpreter to DSP Nicholas Sebastian while recording the cautioned statement of the accused. He signed on pp 2, 5 and 10 of the cautioned statement. He stated that at p 8 line 9, the words 'Ji aba menikau' are in Melanau Mukah language. The meaning is like a person wanting to steal. At p 8 line 26, the words 'Alang-alang hamun, kalau berani cubalah tebak alu' are in Melanau Mukah. The meaning is, if you are daring, try to stab straightaway. The meaning of 'alu' is straightaway stab.

F The defence has raised the defence of drunkenness and the defence of grave and sudden provocation.

I shall now deal with the defence of drunkenness first.

Section 105 of the Evidence Act 1950 is in the following terms:

G When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of those circumstances.

H The relevant parts of s 85(ii)(b) of the Penal Code (FMS Cap 45) read as follows:

(ii) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —

I

(a) ...

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

The relevant part of s 86(ii) of the Penal Code reads as follows:

- (ii) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

The defence has not adduced any evidence that by reason of intoxication the accused was insane, temporarily or otherwise, so I am of the view that the provisions of s 85(ii) of the Penal Code do not apply.

The accused in his testimony testified that on 25 November 1994 at 5pm he consumed a bottle of koping chiew which is an alcoholic drink and one big bottle of stout at Sing Yong Supermarket.

The accused in his evidence also stated that he was surprised why his friends wanted to see the knife and axe that night and he was also feeling a little bit drunk. He also stated he went home and took an axe and a knife. He went back to the junction and sat about 20ft away from Awang Roslan, Ariffin, Awang Ismail, Awang Adeni, Kasma, the deceased and Rozlan. He sat there feeling a bit drunk.

The accused also stated that he wanted to go to town but on seeing the deceased he stopped because he was angry with the deceased and at that time he was not aware of what he was doing.

In re-examination, the accused stated he could not quite remember whether he asked money or not from the deceased because he was drunk at that time.

In re-examination, he was asked, 'You told the court yesterday upon cross-examination that you wanted to punish Awang Jamli because he refused to give you money. By 'punish' did you mean 'to kill him'?' He answered, 'No'. He did not intend to punish the deceased but he admitted that he stabbed the deceased as he was drunk.

The accused agreed that he told the court in answer to cross-examination that the deceased requested for an axe and knife from him and that it was just a joke. At that time, the accused meant that the deceased was really asking for the axe and the knife. The accused did not realize that it was a joke. He misapprehended the deceased because at that time he was drunk.

In re-examination, the accused also said that when he left Yong Kang coffee shop he was normal but felt giddy. By giddy he meant just like a person who is a little bit drunk. He used the axe and the knife to attack the deceased because he was angry with the deceased and he was drunk at that time and not quite aware of what he was doing.

However, in his cautioned statement (D22), the accused did not mention that he consumed a bottle of koping chiew which is an alcoholic drink and one big bottle of stout at Sing Yong Supermarket at 5pm on 25 November 1994. Nowhere in his cautioned statement did the accused mention that he was drunk. When the accused gave his cautioned statement on 29 November 1994, it was only four days after the incident and his memory would be still fresh. If it were true that he did consume a bottle of koping chiew which is an alcoholic drink and one big bottle of stout at

- A Sing Yong Supermarket and that he was drunk, he would have stated these facts in his cautioned statement. Therefore, I reject his evidence in court that he consumed a bottle of koping chiew which is an alcoholic drink and a big bottle of stout and that he was drunk as mere afterthoughts. So I did not accept his evidence that he consumed a bottle of koping chiew which is an alcoholic drink and one big bottle of stout. I also did not accept his evidence that he was drunk.

I accept the evidence of the accused that he did consume a small bottle of Guinness Stout in Yong Kang coffee shop. Further, Ariffin has testified in cross-examination that the accused drank Guinness Stout. Yong Kang in cross-examination has stated that the accused consumed one small bottle of Guinness Stout in the coffee shop.

- D Even if the accused did consume one bottle of koping chiew which is an alcoholic drink and one big bottle of Guinness Stout at Sing Yong Supermarket at 5pm on 25 November 1994 as alleged by him and the fact that the accused did consume a small bottle of Guinness Stout in Yong Kang coffee shop, the accused did not call any expert evidence to establish the probable blood alcohol in him at the time of the offence and how that level of intoxication would have affected the accused.

- E In the absence of expert evidence, I am of the view that the more reliable indicator of the state of the mind of the accused must be the conduct of the accused immediately prior to and after the offence. I am of the view that the following circumstances are pertinent.

- F The accused was able to identify those persons at Yong Kang coffee shop and at the junction of Kampung Tutus Hilir, Mukah clearly. The accused could remember and narrate what happened in Yong Kang coffee shop. He could remember the deceased asking for permission to look at the knife. The deceased also asked for an axe for his use to repair the bench. The accused also stated that the deceased said to him like someone wanting to steal in Melanau. On hearing this, the accused felt angry. So he hit the deceased's head with the axe. Then they struggled with each other. In the midst of struggling, the deceased said, 'Alang-alang hamun kalau berani cucuk terus' in Malay. The accused stated the meaning is that since he had beaten him, if he dared then he should stab. On hearing this, the accused was very angry and he stabbed at the deceased's chest and back. The aforesaid shows that the accused knew what he was doing. If he were drunk, surely he could not remember the words uttered by the deceased and the stabbings in vivid detail.

- H Further in cross-examination, the accused stated that when he went home from Sing Yong Supermarket he was riding his motor cycle in a normal manner. He could see his way back properly. The distance of Sing Yong Supermarket to his house is about 2km. After he went home, he went out to Yong Kang coffee shop on a motor cycle. He was then normal.
- I He also stated that when he went to New Lane Restaurant, he was a bit drunk. However, he agreed that he could understand what was going on around him at that time. He agreed that after he ate satay and drank tea at New Lane Restaurant, he was sober. After eating satay, he went home by motor cycle. He was normal but his head was giddy.

He also agreed that when he stopped at the junction of Jalan Tutus Hilir and saw the deceased, he was still very angry with the deceased. A

The accused in cross-examination agreed that he could walk properly that night. He did not fall down while running home.

The accused also agreed that he had an old grudge against the deceased. The old grudge was because the deceased always promised to invite him for a drink but the deceased never did so. The deceased always had no money. The accused agreed that he was not angry with Awang Roslan and Kasma. The accused also agreed that he ran home after the incident because he knew he had done something wrong. B

Ariffin has testified that at Yong Kang coffee shop the accused asked money from the deceased. When the deceased did not give any money, the accused said 'kedekut' in an angry manner. Yong Kang has also testified that he heard the accused curse the group of people (Rozlan, Sabri, Nora, Ariffin and the deceased) 'kedekut' and 'celaka' very loudly. C

The accused, in cross-examination, agreed that when the deceased refused to give him any money, he was very angry and he called the deceased 'kedekut' in a raised voice. D

The accused agreed that he did not normally carry an axe and a knife around. He agreed that he went home to get an axe and a knife. He had to search for the axe in the house which took quite a long time.

He agreed that when he arrived home, he threw his clothes in the sitting room and in the bathroom because he was angry. He agreed that his anger was against the deceased. E

The accused further agreed that the deceased was unarmed and that it was wrong to attack the deceased.

I am of the view that at the time of the incident, the accused could distinguish the deceased, Awang Roslan and Kasma at the place of incident. The accused only attacked the deceased. The accused did not harm Awang Roslan and Kasma. There was no evidence adduced to suggest that the accused did stumble while walking. There was no obvious unsteadiness on the part of the accused. There was also no evidence of slurring of speech by the accused. Further, I accept the evidence of Yong Kang that the accused did not appear drunk. The accused appeared normal. All the aforesaid in my view shows that the accused was not drunk to such an extent as not to know what he was doing. I found that he was conscious of his surroundings and knew what he was doing. F

In the circumstances, I am of the opinion that the accused could not rely on the defence of intoxication as provided by s 86(ii) of the Penal Code as he failed to prove it on a balance of probabilities. There can be no doubt whatsoever that the injuries were caused by the accused and that he intentionally caused the death of the deceased. G

I shall now deal with the defence of grave and sudden provocation. H

Section 300 of the Penal Code defines murder. Exception 1 to that section is in these terms: I

- A Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, caused the death of the person who gave the provocation, or caused the death of any other person by mistake or accident.
The above exception is subject to the following provisos:
- B Firstly — ...
Secondly — ...
Thirdly — ...
Explanation — whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.
- C Under s 105 of the Evidence Act 1950, the burden on the accused to prove the exception of provocation is that on the balance of probabilities. (See *Ikau anak Mail v PP* [1973] 2 MLJ 153).
In *Ikau anak Mail v PP* [1973] 2 MLJ 153, Azmi LP (delivering the judgment of the Federal Court) at p 154 said:
- D ... To succeed in a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the court that not only by the acts of the deceased that the accused had been deprived of the power of self-control, but such acts of provocation would also have deprived a reasonable man of the power of self-control.
- E And in the case of *Vijayan v PP* [1975] 2 MLJ 8, Choor Singh J (delivering the judgment of the Singapore Court of Appeal) at p 12 said:
... Whether an act which caused death was done in the heat of passion caused by grave and sudden provocation depends in our opinion on whether the provocative act was such as was likely to cause a reasonable man to lose his self-control and to do the act in question.
- F And later on, at the same page said:
... On the other hand, if the act of retaliation is entirely out of proportion to the provocation offered, the plea of grave and sudden provocation fails. It is needless to add that the matter must be considered objectively and that the burden is on the accused to establish provocation on a balance of probabilities.
- G I accept the evidence of the accused that the deceased did utter the words 'Ji aba menikau ji kau' in Melanau language to him. The meaning is like someone wanting to steal. I also accept the accused's testimony that the deceased said, 'Alang-alang hamun kalau berani cucuk terus' in Malay which, according to the accused, meant that since he had beaten him, if he dared then he should stab. Both these facts have been stated in the cautioned statement and in the accused's testimony. Since the cautioned statement was recorded only four days after the incident, I find that the accused was speaking the truth.
- H
- I The accused has stated that he thrust the handle of the axe towards the deceased intending to give it to the deceased. And the deceased pushed it away and said, 'No need'. Then the deceased said, 'Ji aba menikau ji kau' in the Melanau language to him. The accused stated that

the meaning is 'macam orang hendak mencuri' — like someone wanting to steal. On hearing this, the accused felt angry. So he hit the deceased's head with the axe. Then they struggled with each other. In the midst of struggling the deceased said, 'Alang-alang hamun kalau berani cucuk terus' in Malay. The accused stated the meaning is that since he had beaten him, if he dared then he should stab. On hearing this, the accused was very angry and he stabbed the deceased's chest and back.

I find that the accused was angry with the deceased when the deceased did not give him any money in Yong Kang coffee shop. He was also angry with the deceased when he met the deceased at the junction. Due to his anger, I find that the accused did lose his self-control as a result of what the deceased said to the accused. However, I am of the view that, by the standard of a reasonable man, what the deceased said to the accused could not amount to grave and sudden provocation of the accused.

As adverted to earlier, the accused was not drunk to such an extent as not to know what he was doing. He was conscious of his surroundings and knew what he was doing. I find as a fact that the accused knew that when he stabbed the deceased, he was inflicting wounds which would likely cause the death of the deceased.

When the deceased said like someone wanting to steal to the accused, the accused reacted by hitting the deceased's head with the axe even though the deceased was unarmed.

In the midst of struggling with each other when the deceased said, 'Alang-alang hamun kalau berani cucuk terus' in Malay, the accused reacted by using the knife to stab the chest and the back of the deceased even though the deceased was unarmed. The accused must have known that the repeated stab wounds which he inflicted on the deceased were of a kind which would likely result in death. The means of retaliation used by the accused was an unreasonable one in the circumstances bearing in mind what the deceased said to him and that the deceased was unarmed.

In the result, the defence of provocation fails.

In conclusion, I am satisfied that:

- (1) the prosecution has proved beyond reasonable doubt that the accused caused the death of the deceased on 25 November 1994 and that the act which caused his death was murder; and
- (2) the accused has not proved on a balance of probabilities that his conduct falls within exception 1 to s 300 of the Penal Code.

For the above reasons, I find that the accused is guilty of the offence charged and I convict him accordingly.

Accused convicted.

Reported by Jafisah Jaafar